



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

**TO: THE COMMISSION
STAFF DIRECTOR
GENERAL COUNSEL
FEC PRESS OFFICE
FEC PUBLIC DISCLOSURE**

FROM: COMMISSION SECRETARY

DATE: January 26, 2005

SUBJECT: COMMENT: DRAFT AO 2004-45

Transmitted herewith is a timely submitted comment by Marc E. Elias, Esq., and Rebecca H. Gordon, Esq., Counsel to Senator Ken Salazar and Salazar for Senate regarding the above-captioned matter.

Proposed Advisory Opinion 2004-45 is on the agenda for Thursday, January 27, 2005.

Attachment

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January 26, 2005

Lawrence Norton, Esq.
General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Draft Advisory Opinion 2004-45

Dear Mr. Norton:

We submit these comments on behalf of Ken Salazar, the U.S. Senator from Colorado, and Salazar for Senate (the "Salazar Committee"), Mr. Salazar's principal campaign committee, in response to draft Advisory Opinion 2004-45.

The advisory opinion request, which we submitted on behalf of Senator Salazar and the Salazar Committee, concerned the Salazar Committee's spending of contributions it raised during the 2004 election cycle under increased contribution limits pursuant to the "Millionaires' Amendment." The request simply asked whether the Salazar Committee was permitted to use a "last-in, first-out" method of accounting, a generally accepted accounting principle, to determine whether it had "excess contributions" remaining raised pursuant to the Millionaires' Amendment.

The Millionaires' Amendment sets up, by all accounts, a complex process. The Commission acknowledged as much when it promulgated its rules implementing the provision, which remain "interim final rules" to allow the Commission to revise the rules as appropriate. Interim Final Rule: Increased Contribution and Coordinated Party Expenditure Limits for Candidates Opposing Self-Financed Candidates, 68 Fed. Reg. 3,970 (Jan. 27, 2003).

In the 2004 cycle, in which the provisions were tested for the first time, both campaigns and the Commission itself repeatedly faced unanswered questions about

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the way in which these provisions worked in practice. The Salazar Committee's advisory opinion request was borne from one of these questions.

The Office of General Counsel submitted a "blue draft" response that adopts a sensible answer to our question—one that would lend some clarity to the law and allow flexibility to campaigns working within an enormously complicated law. Commissioner Thomas's proposed amendment, however, grafts on to the OGC's blue draft a complex formula, further complicating an already difficult regulatory regime. He does this through the advisory opinion process even though the appropriate forum for such a proposal would be a formal rulemaking, and even though the Commission has not even finalized its current rules interpreting the Millionaires' Amendment.

We continue to believe that in the absence of guidance in the Commission's interim rules, the "last-in, first-out" accounting method, or "LIFO," was as appropriate for this purpose as any other generally accepted accounting method, particularly as LIFO has long been used in the regulated community and endorsed by the Commission in various circumstances. We therefore urge the Commission to adopt the OGC's blue draft in the interest of simplifying a complicated process, and save rulemaking of the kind Commissioner Thomas proposes for the rulemaking process.

Please do not hesitate to call us should you have any questions about this matter.

Very truly yours,



Marc E. Elias
Rebecca H. Gordon
Counsel to Senator Ken Salazar
and Salazar for Senate